In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY,
Petitioner,

vs.

JOSEPH A. CANNATA,
Respondent.

Petition for a Writ of Certiorari

To the Court of Appeal of the State of California,
First Appellate District, Division Three

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

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The petitioner, Allstate Insurance Company, ("Allstate"), defendant in the above-entitled action, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Three ("Court of Appeal") entered in this proceeding on October 20, 1976.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeal in *Cannata v. Allstate Insurance Company* ("Opinion") is reproduced as Appendix A.[1]

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1. Pursuant to Rule 976, California Rules of Court, the subject opinion was not certified for publication in the Official Reports.

The order of the Court of Appeal denying Allstate's Petition for Rehearing, not officially reported, is reproduced as Appendix B.

The order of the California Supreme Court denying Allstate's Petition for Hearing, not officially reported, is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeal was entered on October 20, 1976. A timely Petition for Rehearing was denied by the Court of Appeal on November 19, 1976. A Petition for Hearing before the California Supreme Court was timely filed and was denied by that Court on December 29, 1976. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date, and is therefore timely. *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942), *re. den.,* 318 U.S. 802 (1943); *United States v. Healy*, 376 U.S. 75, 77-80 (1964).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Should state court jurisdiction over employer conduct, i.e., discharge of an employee for pro-union activity or statements, be pre-empted by federal law?

2. Is a state court free to ignore special jury findings and refuse to apply the "arguably" rule mandated by *San Diego Building Trades v. Garmon?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization is a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. § 158a:

It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 157; . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

Petitioner, Allstate, seeks this Court's review of a judgment rendered against it in an action brought by respondent for breach of an employment contract and fraud. A jury returned verdicts of $150,000 compensatory damages and $500,000 punitive damages in favor of respondent and judgment was entered accordingly. The action arose out of the termination of respondent's employment with Allstate on May 26, 1968.

On October 3, 1960, respondent was hired as a claims adjustor in Allstate's San Francisco District Office. He progressed in the skills of claims adjusting and in July, 1962 he was promoted to casualty claim examiner. In March, 1964, respondent was promoted to casualty claims supervisor. He held that position until his termination in May, 1968.

Respondent pleaded and at trial offered evidence which he claimed showed that his termination was the result of the fraudulent conduct of Allstate in misrepresenting at the outset of his employment in 1960 that it was a fair and ethical company, that he could continue to work for Allstate until his normal retirement at age 62 so long as he substantially complied with all of Allstate's directions save those which would be unlawful, and that if his employment was ever in jeopardy he would be given notice and the opportunity to improve. During his employment respondent became increasingly critical of Allstate's policies, including those relating to the handling and disposition of insurance claims. He critcized several of Allstate's policies in front of his colleagues and subordinates.

Respondent also defied Allstate's policy regarding union activity among its adjustors. He encouraged union organization despite his knowledge that management wanted no unions at Allstate. Respondent also criticized Allstate's no-union policy and on one occasion invited several other adjustors to his or another adjustor's residence where he and several claim adjustors met to discuss organization of the union among claim adjustors.

A memorandum in the Allstate employee relations file dated September 5, 1967 advises management that "2 people in S.F. Joe Canata Supr. Tom Gedge dispatch adj. would be interested in organizing. Canata's brother is a union organizer for unknown group."

On May 3, 1968 respondent's immediate superior wrote the Regional Manager recommending that respondent be dismissed for his unsatisfactory attitude and exercising unsatisfactory leadership as a supervisor. The first paragraph of that three-paragraph letter is devoted to respondent's pro-union activities and statements:

> On May 2, Casualty Director Bud Danen was in the San Francisco office in connection with our telephone investigation claim handling. While Bud was there he had a conversation with Joe Cannata in which Joe said the he understood the union was getting a foothold. Bud asked what he meant by 'foothold' and Joe replied, 'Well, there is a lot of talk about a union among claims men.' Bud then said, 'We don't need one at Allstate' and Cannata replied, 'I don't know, I think it might do a lot of good to have one here.'

The letter concluded as follows:

> "I therefore recommend that we dismiss him immediately for an unsatisfactory attitude and exercising unsatisfactory leadership."

Respondent was terminated on May 21, 1968. He commenced this action by filing suit on May 13, 1969. Jury trial of this action began on August 5, 1974. On September 6, 1974 the jury returned a verdict in favor of respondent, awarding him $150,000 compensatory and $500,000 punitive damages.

In addition to the general verdict, the jury returned answers to two special interrogratories which had been submitted to them by the trial judge:

> "1. We find the Plaintiff, JOSEPH A. CANNATA when he was terminated by Defendant, ALLSTATE INSURANCE COMPANY, a corporation, held a position as a:
>
> Managerial employee [ ]
> Non-managerial employee [X]

2. Were pro-union activity or statements a material factor in the termination of employment of Plaintiff, JOSEPH A. CANNATA, by Defendant, ALLSTATE INSURANCE COMPANY, a corporation:

[X] Yes [ ] No."

These special interrogatories had been submitted to the jury by the trial judge after extended discussions and arguments by the parties arising out of Allstate's requested instruction to the jury on the subject of respondent's pro-union activity.

On review the Court of Appeal found that these findings were supported by substantial evidence:[2]

> This finding was supported by substantial evidence, as previously discussed. (Opinion, p. 4).

The Court of Appeal also found that the record contained evidence that by discharging respondent, Allstate attempted to "chill" or interfere with employee's rights[3] under the Act:

> There can be no question here that there is evidence that Allstate was at least attempting to 'chill' the employee's right under Section 7, if not in fact interfere with that right. (Opinion, p. 7).

The Court of Appeal, however, disregarded the jury's special findings as "surplusage", and held that because Cannata's union activity was "peripheral to the case" California's jurisdiction to award money damages was not pre-empted. Accordingly, it affirmed the judgment of the trial court. The Court of Appeal denied Allstate's petition for rehearing and the California Supreme Court denied a petition for hearing with three of the seven justices voting to grant the petition. The judgment of the Court of Appeal thereby became final, which judgment is the subject of this petition.

2. Though the Court of Appeal referred to the findings in the singular, its discussion of their significance shows that it was considering both.

3. Since the special finding held that plaintiff was a nonmanagerial employee he is an employee within the meaning of § 2(3) of the N.L.R.A. and entitled to the protection of § 7 and § 8 of the Act. The Court of Appeal agreed. Even if plaintiff had been a managerial employee, suit upon his discharge would have been preempted. *Iron Workers Union v. Perko*, 373 U.S. 701, 707 (1963); *Beasley v. Food Fair of North Carolina, Inc., et al.*, 416 U.S. 653 (1974).

PRESENTATION OF THE FEDERAL QUESTION

The federal question for which this petition seeks review was seasonably raised by petitioner during the trial. This was done by the proffer of an instruction to the jury by petitioner to the effect that if the jury found respondent was terminated for pro-union activity, solicitation or sympathy, it could not return a verdict for him. This and similar instructions were refused by the trial court which, after hearing argument by counsel, determined to present the labor preemption issue to the jury in the form of special interrogatories pursuant to California Code of Civil Procedure, Section 625. Petitioner submitted a form of such interrogatories, but the trial court refused it as presented and submitted its own form to the jury (Statement of the Case, p. 6).

Following rendition of the jury verdict, petitioner timely filed and argued post-trial motions, one of which was to vacate the judgment for respondent and enter judgment of dismissal on the ground that under the provisions of California Code of Civil Procedure, Section 625, the general verdict was inconsistent with the special findings and was controlled by such findings. The argument was premised on the principle that since the jury's special findings meant that respondent's discharge by petitioner was arguably an

unfair labor practice, the cause of action was preempted and the trial court had no jurisdiction to enter any judgment for respondent. This motion was denied and a timely appeal was taken therefrom.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeal Deliberately Refused to Concede That California's Jurisdiction Over This Case Is Preempted by Federal Law.

Notwithstanding a jury finding (found by the Court of Appeal to be supported by substantial evidence) that Allstate's discharge of plaintiff was motivated, in material part, by his pro-union activities or statements, the Court of Appeal refused to apply the doctrine of federal preemption and order dismissal of the action. In concluding the preemption doctrine was inapplicable because plaintiff's union activities were "peripheral to the case", the Court of Appeal invented a totally new and unsupported formulation of the preemption rule which is in clear and present conflict with the many relevant decisions of this Court. This Court is continually called upon to exercise its responsibility to insure that the state courts do not infringe upon federal jurisdiction. One area where federal jurisdiction is paramount is in labor relations which, for present purposes, are exclusively governed by the National Labor Relations Act, as amended ("Act"). The Court of Appeal's decision below is a flagrant and direct intrusion into the exclusive jurisdiction of the National Labor Relations Board ("Board"). This Court should therefore grant the petition for certiorari in order to set aside the decision below and restore the proper balance between state and federal power in the sensitive area of labor relations.

A. THE BASIC PREEMPTION RULE IS THAT STATES ARE FORECLOSED FROM JURISDICTION OVER ANY CONDUCT ARGUABLY AN UNFAIR LABOR PRACTICE UNDER THE ACT.

Sections 7 and 8 of the Act (29 U.S.C. §§ 157, 158) define protected and prohibited labor activities. In *San Diego Building Trades* v. *Garmon,* 359 U.S. 236, 244 (1959)[4] this Court ruled that in passing the Act, Congress mandated uniform application of its rules regarding employment relations and elimination of conflicts resulting from varying local statutes and rules of decision regarding labor problems. The Court explained:

> Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes. (*Id.* at 244).

Prompted by these considerations, this Court established the federal preemption rule governing the employment relations area, and held that if the conduct in question is "*arguably* subject to § 7 or § 8 of the Act, the States . . . *must* defer to the *exclusive* competence of the National Labor Relations Board . . ." (*Id.* at 245, emphasis added.)

This preemption rule was recently reaffirmed in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25, et al.,* U.S.L.W., 45 L.W. 4263, 4265 (opinion filed March 7, 1977) where a unanimous Court through Justice Powell stated:

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4. The history of the *Garmon* litigation is significant. In *San Diego Building Trades* v. *Garmon,* 45 Cal.2d 657 (1955) the California Supreme Court upheld a damage award to an employer based on a union's secondary picketing. The United States Supreme Court reversed in *San Diego Building Trades* v. *Garmon,* 353 U.S. 26 (1957) on the basis of preemption, and remanded. The California Supreme Court then held that the union activities constituted a tort under state law, and reaffirmed the award. (49 Cal.2d 595). However, the United States Supreme Court again reversed the California Supreme Court in *Garmon II.*

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. (359 U.S. at 244.)

The crucial feature of the rule is that the conduct in question need only be *arguably* subject to sections 7 or 8 of the Act to oust the state court of jurisdiction. In *Garmon, supra,* Mr. Justice Frankfurter explained why only this minimal threshold is required to trigger the preemption rule:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. (*Garmon, supra* at 244-5).

This rule of preemption is an expression by this Court of binding federal law, and under the supremacy clause of the United States Constitution, the Court of Appeal was required to apply such rule. United States Constitution Article VI, Clause 2; *Gibbons* v. *Ogden,* 22 U. S. 1 (1824).

The rule of preemption was established long ago by this Court with both clarity and vigor. It has been reaffirmed on several occasions in equally convincing terms. Here the Court of Appeal was presented with facts specially found by

a jury, and with a record which by its own concession was consistent with the application of the preemption rule. Yet, it chose to ignore its duty and, in a thinly disguised effort to preserve what it considered to be a proper result, disobeyed the unequivocal directions of this Court to terminate state jurisdiction over this dispute. The Court of Appeal judgment stands in open defiance to the many decisions of this Court which compel preemption in these circumstances. So clear is the path and so cogent the mandate that the judgment below appears to be a deliberate confrontation with the preemption decisions of this Court. It should be dealt with accordingly.

B. THE SPECIAL FINDINGS THAT A MATERIAL REASON FOR HIS DISCHARGE WAS PRO-UNION ACTIVITY OR STATEMENTS ESTABLISHED THAT PLAINTIFF'S DISCHARGE WAS ARGUABLY AN UNFAIR LABOR PRACTICE.

Section 8(a)3 of the Act makes it an unfair labor practice for an employer:

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (29 U.S.C. § 158(a)(3)).

Section 8(a)1 makes it an unfair labor practice for an employer:

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § [7] . . . (29 U.S.C. § 158(a)1).

Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining or *other mu-*

tual aid or protection, and shall also have the right to refrain from any or all of such activities . . . (29 U.S.C. § 157; emphasis added.)

Petitioner contends that the Court of Appeal need have gone no further in its consideration of this issue than to measure the effect of the special findings of the jury and its own review of the trial record against the quoted provisions. The jury found that Allstate *discharged* respondent, in material part, because of his *pro-union activity* and *statements*. Such conduct, at the very least, *arguably* falls within the prohibitions of Section 8(a)(3) of the Act. It requires no citation of cases or elaborate exercise in logic to reach this conclusion. The very words of Section 8(a)(3) proscribe discrimination in tenure of employment to discourage membership in any labor organization. What else is discharge for pro-union activity or statements than the grossest form of such discrimination? Again, in Section 7, one finds that employees are protected in their right to self-organization or to form, join or assist labor organizations and that Section 8(a)(1) flatly prohibits employer interference with these rights. The Court of Appeal found that "[T]here can be no question here that there is evidence that Allstate was at least attempting to 'chill' the employee's rights under Section 7, if not in fact interfere with that right." (Opinion, p. 7). Petitioner urges that the nearly perfect alignment between the facts found by the Court of Appeal and the prohibitions of the statutory provisions should have compelled a ruling that Allstate's conduct was arguably an unfair labor practice, *per se*, without any further examination of case authority on the subject. The question was closed at that point.

However, if further inquiry on this subject was deemed necessary, it is clear that the same result should have

obtained. Together the quoted statutory provisions have been interpreted to guarantee employees or even a single employee the right to enagage in a broad spectrum of activities for mutual aid and protection ranging from organizing unions to merely discussing them. It has been the position of respondent throughout this litigation that because there was no evidence in the record of activity of a formally constituted labor organization, this was not really a "labor" case wherein the doctrine of preemption would have any application. As this Court knows, the argument is wholly specious.

This Court long ago decided that there need be no formal labor organization on the scene to qualify the jointly sponsored activities of employees as "concerted activities" for purposes of their protection under Section 7 of the Act. *N.L.R.B.* v. *Washington Aluminum Company*, 370 U.S. 9 (1962). There it was held that unorganized workers who walk out to protest coldness of their work area are protected in these activities even though no formal demand was made upon their employer to rectify this condition of employment prior to their walkout and no labor union was present. Lower federal courts and the Board have consistently bowed to this line of authority. Thus, where two employees merely discuss the need for union organization, they are protected by section 7. In *Root-Carlin, Inc.*, 92 N.L.R.B. No. 203, 27 L.R.R.M. 1235 (1951), discharge of an employee for such a discussion was held to violate 8(a)1 and 8(a)3. In *N.L.R.B.* v. *Quest-Shon Mark Brassiere Company*, 185 F.2d 285 (2d Cir. 1950) *cert. den.* 342 U.S. 812 (1951) several employees discussed organizing and circulated a petition to probe union interest. None were union members. The court ruled that their discharge was an unfair labor practice. In *N. & G. Chrysler-Plymouth*, 186

N.L.R.B. No. 45, CCH Lab.L.Rep. ¶22, 423 (1970) the Board ruled that discharge of an employee for suggesting to co-workers that they should organize a union was a violation of sections 8(a)1 and 8(a)3.

Even mere griping and complaining are protected activities within the meaning of section 7 when there is contemplation of collective activity. *N.L.R.B.* v. *Buddies Supermarkets*, 481 F.2d 714, 717-718 (5th Cir. 1973); *Mushroom Transportation* v. *N.L.R.B.*, 330 F.2d 683 (3rd Cir. 1964).

Activity designed to further the interests of more than one worker is "concerted activit[y] for the purpose of . . . mutual aid or protection" within the meaning of section 7 even though only one person may be active. *Salt River Valley Water Users' Ass'n.* v. *N.L.R.B.*, 206 F.2d 325, 328 (9th Cir. 1953); *Randolph Division, Ethan Allen, Inc.* v. *N.L.R.B.*, 513 F.2d 706 (1st Cir. 1975).

Finally, a discharge is an unfair labor practice even if it is motivated only *in part* by anti-union animus. *Ridgely Manufacturing Co.* v. *N.L.R.B.*, 510 F.2d 185, 186 (D.C. Cir. 1975); *S. A. Healy Co.* v. *N.L.R.B.*, 435 F.2d 314, 316 (10th Cir. 1970). In this case the jury found that plaintiff's pro-union activity or statements were a *material factor* in his discharge.

These authorities show that if individual action is for the purpose of mutual aid, then it is afforded the same level of protection as organized group or union activities. These cases also demonstrate, beyond any reasonable doubt, that the special findings compel the conclusion that respondent's discharge was arguably an unfair labor practice, for the jury found that he was discharged, in *material* part, for *pro-union activity* or *statements*. Indeed, there is no more effective means of discouraging "pro-union

activity or statements" than by firing those employees who engage in it.[5]

Here again, the Court of Appeal was confronted with jury findings and trial record which demanded the application of the preemption doctrine. The Court of Appeal deliberately sidestepped its judicial duty and, on the basis of its own completely novel and unprecedented distortion of the *Garmon* test, refused to terminate state jurisdiction. Such discretionary abuse cannot stand uncorrected.

C. THE COURT OF APPEAL MISUNDERSTOOD THE PREEMPTION RULE OR MISAPPLIED A RECOGNIZED EXCEPTION THERETO.

The few well-defined exceptions to the preemption rule are frequently grouped under two headings: (1) *activities* merely peripheral to the *concerns* of the Act; and (2) *conduct* touching interests so deeply rooted in local responsibility that it cannot be concluded in enacting the Act that Congress intended to deprive the states of jurisdiction. See *Garmon*, at 243, 244. The second group of exceptions may be put to one side since none of these exceptions applies to the instant case and neither respondent nor the Court of Appeal has suggested the contrary. More particularly, nothing contained in this Court's recent opinion in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America Local 25, et al, supra*, compels a different result. Nothing appears either in the pleadings or the evidence of the instant case which begins to approach from afar the egregious conduct complained of and the injury

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5. Intent to discriminate is *conclusively* presumed when the employer's conduct is deemed "inherently destructive" of important employee rights and presumed if it *could have* affected employee rights to some extent. *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967). Under this standard the requisite intent would be conclusively presumed in this case, for what could be more destructive of employee rights than discharge?

sustained in *Farmer*. Mr. Justice Powell was precise in limiting the permissible cause of action in *Farmer*, intentional infliction of emotional distress, to a situation where "the defendants had intentionally engaged in 'outrageous conduct, threats, intimidation, and words' which caused Hill to suffer 'grievous mental and emotional distress as well as great physical damage'" (*supra* at 4266). To further close the loop around this precisely limited exception to the preemption rule, Mr. Justice Powell was again careful to point out that employment discrimination within the federal regulatory scheme cannot itself become the predicate for the "outrageous" conduct upon which a state court tort action can be based. State court recovery may only proceed from additional facts over and above employment discrimination which satisfy the requirement for recovery based upon state tort law. In the instant case it is obvious that the additional facts are not present.

The Court of Appeal may have misconstrued the first exception and erroneously applied it to this case.[6] It purported to rely upon *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (1958) and *Sears Roebuck & Co.* v. *San Diego Council of Carpenters*, 17 Cal.3d 893 (1976) *cert. granted* ..... U.S. ..... (1977) as authority for its distorted formulation of the "perhipheral" test. Indeed, the real "peripheral" test had its gensis in the *Gonzales* opinion. However, *Gonzales* provides no authority for holding that the preemption rule is inapplicable where the protected union activity is merely peripheral to the *case*. Mr. Justice Frankfurter's opinion in *Gonzales* explains why a suit over purely internal union matters is not preempted:

6. Because of the ambiguity of the Opinion (see Opinion, p. 7) in this regard, it cannot be determined whether the Court of Appeal believed the *Garmon* preemption rule did not apply in the first instance or that the case at bar fell within the so-called "peripheral" exception articulated in *Gonzalez*. In either case, its reasoning is fatally flawed.

> ... the potential conflict is *too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act*, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. (*Id.* at 621; emphasis added.)

This holding was based on the Supreme Court's perception that the conduct involved in *Gonzales*, because it related solely to *internal union matters*, was remotely connected to the purpose of the *Act*. *Gonzales* does not hold or even remotely suggest that where "evidence of ... unionization activities ... [is] merely peripheral to the case ... [there is] an insufficient basis for depriving the state court of jurisdiction." (Court of Appeal Opinion, p. 7.)

Likewise, in *Sears, Roebuck & Co.* v. *San Diego County Council of Carpenters, supra*, the California Supreme Court properly recognized in dictum that the *Gonzales* exception to the preemption rule is justified "where the *activity regulated* was a merely peripheral concern of the Labor Management Relations *Act*." (*Id*, at 901).

These decisions demonstrate that the "peripheral" exception is limited to cases where the conduct in question is *peripheral to the concerns of the Act*. All prior decisions of this Court have confined this exception to disputes arising from purely *internal union matters*. The case at bar does not concern itself with internal union matters and it cannot be seriously contended that discharge of an employee for pro-union activity or statements is peripheral to the concerns of the Act. Thus, these decisions furnish no authority for the Court of Appeal's misconception that the preemption rule was inapplicable.

Moreover, the "peripheral to the case" standard invented by the Court of Appeal is in direct conflict with and under-

mines the basic policy of *Garmon* and its progeny. This Court's opinion in *Garmon* makes clear the policies of the Act require that any judicial action, seeking either injunctive relief or damages because of conduct which is arguably an unfair labor practice must be preempted:

> Our main concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. *Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.* (*Id.* at 246; emphasis added.)

and earlier:

> Nor has it mattered whether the States have acted through the laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to *control conduct* which is the subject of national regulations would create potential frustration of national purposes. (*Id.* at 244; emphasis added, footnotes omitted.)

Thus, suits for discharge, whether based on tort, contract, or any other comomn law theory, have consistently been held preempted if the discharge was arguably an unfair labor practice. In *Amalgamated Association of Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971) this Court reversed a union member's judgment for damages against a union for breach of contract and procurement of discharge.[7] The Court found the discharge to be arguably an unfair labor practice, and explained:

> "At *bottom,* of course, the Union's action in procuring Lockridge's dismissal from employment is the *conduct* which Idaho Courts have sought to regulate . . .
>
> "[I]t would seem that this case indeed represents one of the clearest instances where the Garmon principle . . . should operate to oust state court jurisdiction." (*Id.* at 292-293; emphasis added.)

Discharge is discharge, and the language of *Lockridge* applies with even more force to this case. Like *Lockridge,* at the "bottom" of this case, is conduct causing a discharge. Indeed, the instant case presents the perfect example of that which is the intended object of the protections or prohibitions of the Act. Here we are dealing with the relationship of employer-employee uncomplicated by the presence of a labor organization as the supporting actor in the drama of discharge. One cannot imagine a relationship, and an act in derogation of that relationship, more central to the concerns of the Act than is presented by this case, i.e., an employer's termination of an employee because of his pro-union activities or statements.

It is Allstate's conduct—discharging respondent for pro-union activity or statements—which triggers preemption. Whether pro-union activity is peripheral to the case is simply immaterial and the Court of Appeal fell into stark error in concluding otherwise.

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7. For a union to cause or attempt to cause an employee's discharge for his union membership or non-membership is an unfair labor practice under § 8(b)2 of the N.L.R.A. and within the exclusive jurisdiction of the N.L.R.B. Petitioner submits that the recent opinion in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America Local 25, et al., supra,* specifically reaffirms the soundness of the *Lockridge* decision and these arguments based upon the Lockridge holding.

The special findings[8] of the jury and the evidence supporting them require the conclusion that, at the very least, Allstate's discharge of petitioner was arguably an unfair labor practice.

D. A STATE COURT MAY NOT IGNORE JURY FINDINGS AND EVIDENCE SHOWING THAT THE CONDUCT IN ISSUE WAS AN UNFAIR LABOR PRACTICE.

This Court has yet to declare the sources to which a state court must look to determine whether the conduct it is concerned with is arguably an unfair labor practice. In this case, the Court of Appeal believed that it was free to ignore the special findings of the jury which unavoidably lead to the conclusion that the conduct in question was arguably an unfair labor practice. In addition, the Court of Appeal ignored substantial portions of the trial record as well, stating that the record "as a whole" made it appear that the question of unfair labor practice was "peripheral to the case." If this Court's ruling, that passage of the Act by Congress mandated uniform application of federal in place of state law is to have meaning, then such cavalier disregard of these sources cannot be permitted. If a state court is free to select which sources of evidence it will credit in making the threshold finding of whether a particular course of conduct was preempted, there is no meaning left to the term "arguably."

A state court, jealously seeking to preserve its own jurisdiction, might disregard those sources which clearly point, as here, to a conclusion that an unfair labor practice arguably had been committed. It might consider itself free to credit only those sources which point to the conclusion that the exercise of state jurisdiction was proper. If the preemption rule is to have vitality at all, this Court should now mandate that those sources of evidence properly before a state court on appellate review must be received and acted upon regardless of the result. No state court should be free to "weigh" the evidence in the fashion of the Court of Appeal here to determine whether a particular case was "in essence" not one which involved a labor relations question. It is not within the prerogative of a state court to engage in such a process when this Court has previously ordained the proper course to be followed.

8. In the case of *Local 100, Association of Journeymen and Apprentices* v. *Borden*, 373 U.S. 690 (1963), this Court specifically endorsed the use of the special findings of a jury as the test for preemption. It held that, on the basis of special jury findings, the defendant's conduct was arguably an unfair labor practice, and that therefore the jurisdiction of the Texas courts was preempted.

II. This Court's Decision in Farmer v. Carpenters Mandates the Grant of This Petition and the Summary Reversal of the Decision of the Court of Appeal.

Any doubt that this case was subject to the federal preemption rule has been erased by this Court's decision in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25, et al., supra.* In reaching its determination that the cause of action presented therein was beyond the purview of the preemption rule, this Court made a number of affirmative statements clearly defining the boundaries of the zone of preemption. Consideration of the causes of action sued upon by the respondent in this case and for which he received huge money damages, compels the conclusion that the case is clearly subject to preemption and should never have been allowed to go to judgment.

In *Farmer* this Court required that for a state tort action to proceed, it must appear that the gravamen of that tort be wholly separate and apart from the merits of the underlying labor dispute:

> But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. (*Id.*, at 4267)

If one removes the underlying employment discrimination arguably perpetrated on the respondent, there is nothing left. The jury specially found that the respondent was terminated *in material part* by reason of his pro-union activity or statements. As demonstrated earlier in this Petition, termination of employment is the central concern of the Act. It does no good to claim, as did respondent, that this termination of employment happens to be the breach of an oral contract or the culmination of petitioner's fraudulent behavior toward plaintiff. As recognized numerous times throughout the Court of Appeal's Opinion, this case was one of wrongful termination of employment. The independent unrelated circumstances which Justice Powell stressed are the pre-requisite for escape from the federal preemption rule are simply not present here.

Petitioner emphasizes that what this Court found to be a risk in the *Farmer* case is a reality. Mr. Justice Powell was concerned that the *Farmer* jury *may* have rested its award of damages upon the employment discrimination practices against Mr. Hill rather than solely upon the abusive and unrelated activities of the union in its infliction of emotional distress upon him. The jury's verdict was vacated so that it could be properly instructed upon retrial that damages may not be based upon the union's discriminatory conduct. Here, there is more than a risk that respondent

may have been awarded damages for federally protected activity; The forbidden result has occurred. The jury specially found that respondent was terminated for his pro-union activity or statements (conduct which is necessarily employment discrimination prohibited by §§ 8a(1) and (3) of the Act) and awarded total damages of $650,000. In the face of this Court's holding in *Farmer*, the instant verdicts for both general and punitive damages cannot stand.

Petitioner would also call the Court's attention to the amount of the damages awarded to respondent in light of Justice Powell's admonition that:

> We also repeat the state courts have the responsibility in cases of this kind to assure that the damages awarded are not excessive. *See, Linn vs. Plant Guard Workers*, 383 U.S. at 65-66. (*Id.*, 4267.)

Surely, damages of the amounts awarded respondent, particularly the punitive damages in the amount of $500,000, show that this rule has been disobeyed.

CONCLUSION

The Judgment below appears to be a deliberate confrontation with the preemption decisions of this Court. In outright defiance of this Court's repeated declarations that a state court may exercise no jurisdiction over union conduct which is even "arguably" an unfair labor practice under the Act, the Court of Appeal at one and the same time asserts jurisdiction over petitioner's conduct and holds that special jury findings compelling the conclusion that an unfair labor practice has been committed were supported by substantial evidence. Petitioner submits that the Opinion contains an irreconcilable internal inconsistency which can only be resolved by a finding of federal preemption.

A state court decision thus according supremacy to the state over federal law is at war with the mandate of the supremacy clause that federal law shall be accorded the sovereign rank throughout the United States. Such a decision cannot survive as it will continue to breed litigation in derogation of federal law; litigation until now stilled by the federal preemption and supremacy standards. Especially must a state decision in definance of the supremacy clause be reversed, when, as here, the Court of Appeal has presumed to impose state jurisdiction on an activity which Congress has regulated by uniform national policy, in this case, union conduct regulated in the Act. The Act is "of course the law of the land which no state law can modify or repeal," *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 238 (1967), "[a] national system for the implementation of this country's labor policies • • •," *id.*, at 239, and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies," *Garner v. Teamsters' Union,* 346 U.S. 485, 490 (1953), a national system in which ". . . Congress has expressed its judgment in favor of uniformity." *Guss* v. *Utah Labor Board,* 353 U.S. 1, 10-11 (1957).

The decision of the Court of Appeal does precisely what Congress and this Court have forbidden. It is a step toward different labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the national system for the implementation of this country's labor policies.

Twenty-one years ago, California sought to secede from that national system in *Garmon* and was twice rebuffed by this Court. California here again seeks to secede from that national system. This attempt at secession must likewise be blocked by this Court.

For the reasons stated herein, this Petition should be granted and the judgment and decision of the Court of Appeal below be summarily reversed.

Dated: March 24, 1977.

Respectfully submitted,

COOPER, WHITE & COOPER
CHARLES W. KENADY
R. BARRY CHURTON
Attorneys for Petitioner

Appendix A

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California
First Appellate District, Division Three

1 Civil 37878
(Sup. Ct. No. 603623)

Filed
Oct. 20, 1976
Court of
Appeal
First App.
Dist.
Clifford C.
Porter, Clerk
By .....
Deputy

Joseph A. Cannata,
Plaintiff and Respondent,
vs.
Allstate Insurance Company,
Defendant an Appellant.

Allstate Insurance Company appeals from a judgment after trial by jury in favor of Joseph A. Cannata, in the sum of $150,000 compensatory damages and $500,000 punitive damages.

1. The threshold issue to be determined here is whether the trial court lacked jurisdiction because of federal preemption under the Labor Management Relations Act. (29 U.S.C., § 141 et seq.)

Cannata by his complaint sought to recover damages for the wrongful termination of his employment with Allstate. Four causes of action were pled, two based upon breach of an alleged oral contract and two for fraudulent misrepre-

sentation. The complaint set forth in some detail the factual bases upon which Cannata relied in support of his allegation of wrongful termination of his employment. The general thrust of the complaint was that he was terminated for criticizing what he believed to be the immoral and unethical policies of Allstate as they related to Cannata's work as an insurance claims adjuster. None of the allegations made reference to any conduct relating to unionization activities by Cannata, nor was there an allegation that he was terminated for his pro-union philosophy or activities.

In his opening statement, the attorney for Cannata made reference to possible evidence of Cannata's pro-union activities and stated, "perhaps this is one of the reasons they decided to get rid of him." Evidence was introduced that Cannata, while an Allstate employee, voiced approval of union organization and criticized Allstate's non-union policy. He once invited other adjusters to a meeting to discuss the possibility of organizing a union among the claims adjusters. There is also evidence that he was discouraged by his employer in such activities. A substantial portion of the testimony regarding unions came from Allstate officials, who tried to explain Allstate's policy. The policy was that Allstate was not anti-union, but when employees talked about unionization, the management wanted to know so that they could correct the alleged deficiencies that inspired the unionization talk. The testimony of several witnesses, including Cannata, regarding Cannata's union activities and Allstate's policies regarding unions, that is, the total reference to unions in the record, appears on less than 125 pages of a total reporter's transcript of 2,538 pages. Two out of 75 documents placed in evidence have some reference to Cannata's union discussions. Mention was made briefly by counsel for both parties, in their opening statements and closing arguments, of Cannata's unionization activities and Allstate's reaction thereto.

The thrust of Allstate's defense was that Cannata was terminated for disloyalty to the company by being critical of its valid policies and, generally, because Cannata did not have the right attitude. One Allstate official (Keller Potter), under questioning by Allstate's attorney, testified that a supervisory employee like Cannata, who did not report unionization talk by fellow employees, would be considered disloyal and such would be, at least in part, sufficient grounds for termination.

The jury made two special findings upon which Allstate relies in asserting its contention that the state court lacked jurisdiction. Those findings are as follows:

"1. We find the plaintiff, JOSEPH A. CANNATA, when he was terminated by Defendant, ALLSTATE INSURANCE COMPANY, a corporation, held a position as a:

Managerial employee	[ ]
Non-Managerial employee	[X]

"2. Were pro-union activity or statements a material factor in the termination of Plaintiff, JOSEPH A. CANNATA, by Defendant, ALLSTATE INSURANCE COMPANY, a corporation:

[X] Yes [ ] No."

On the basis of these special findings, appellant Allstate contends that Cannata's discharge was *arguably an unfair labor practice* within the meaning of the Labor Management Relations Act (Act), and that the trial court therefore was without jurisdiction. It is asserted that exclusive jurisdiction rested in the National Labor Relations Board (NLRB). Reliance is placed primarily upon the United States Supreme Court decision in *San Diego Unions v. Garmon* (1959) 359 U.S. 236.

Respondent argues that the special findings of the jury do not establish an unfair labor practice such as to preempt

state jurisdiction, and that there is no evidence to support the claim that Cannata's discharge was an unfair labor practice within the meaning of the Act. In addition, respondent contends that the issue should have been raised prior to trial, by demurrer or by petition for removal to federal court. Questions of subject matter jurisdiction are never waived and may be raised at any stage of the proceedings, even on appeal. The very nature of subject matter jurisdiction is such that it cannot be conferred by consent, waiver or estoppel. (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 721; *Russell v. Electrical Workers Local* 569 (1966) 64 Cal.2d 22; 1 Witkin, Cal. Procedure (2d ed. 1970) Jurisdiction, § 10, pp. 534-535, and cases there cited.) Hence, it may be concluded that the jurisdictional issue raised by appellant is properly cognizable by this court on appeal.

We first examine the effect of the special finding. Special interrogatories to a jury are permitted at the discretion of the trial court. Where a special finding of fact is inconsistent with the general verdict, the former controls the latter. (Code Civ. Proc., § 625.) The purpose of the special interrogatory is to test the validity of the general verdict by determining whether all facts essential to support the general verdict were established to the satisfaction of the jury. (4 Witkin, Cal. Procedure (2d ed. 1970) Trial, § 266, pp. 3074-3075.) Normally, a finding supported by substantial evidence will not be disturbed on appeal. This finding was supported by substantial evidence, as previously discussed. Here, however, the special finding is surplusage, and as such may be disregarded. (See 48 Cal.Jur.2d., Trial, § 252, p. 262.) Whether a court has jurisdiction of a particular cause is a matter of law to be determined by the court. The court itself is vested with the jurisdiction to determine

its own jurisdiction. (1 Witkin, Cal. Procedure (2d ed. 1970) Jurisdiction, § 230 et seq., p. 767 et seq.) Any finding by a jury regarding the jurisdiction of a court is therefore necessarily surplusage, as that determination is within the exclusive province of the court. Since the special finding here is surplusage, it does not affect the general verdict. We must review the evidence to determine if the state court had jurisdiction.

It is now firmly established that the Act preempts both state and federal court jurisdiction to remedy conduct that is arguably prohibited or protected by the Act. (*Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 276; *Plumbers' Union v. Borden* (1963) 373 U.S. 690, 693-696; *San Diego Unions v. Garmon* (1969) 369 U.S. 236, 244-245; *Hill v. United Brotherhood of Carpenters etc. of America* (1975) 49 Cal.App.3d 614, 620, cert. granted 96 S.Ct. 876.) Sections 7 and 8 of the Act (29 U.S.C., §§ 157, 158) are broad provisions governing both protected "concerted activities" of employees and unfair labor practices on the part of employers.

In *San Diego Unions v. Garmon* (1958) 359 U.S. 236, the court stated (at pp. 244-245):

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. *But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.* What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e.g., Garner v. Teamsters Union,* 346 U.S. 485, especially at 489–491; *Weber v. Anheuser-Busch,*

> *Inc.*, 348 U.S. 468. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. (Emphasis added.)

The first inquiry in any case involving such a claim of federal preemption must be whether the conduct called into question may reasonably be asserted to be subject to NLRB cognizance. (*Plumbers' Union v. Borden, supra,* 373 U.S. 690, 694.) It is not necessary that the court determine whether the activity in question was federally protected or prohibited; it is sufficient to find that it is "reasonably arguable" that the matter comes within the Board's jurisdiction. (373 U.S. at p. 696.)

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to interfere with the formation or administration of any labor organization. Section 8(a)(3) prohibits discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activties.

It has been held that interference with rights of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, including discharge of employees for the exercise of those rights, is an unfair labor practice. (*N.L.R.B.* v. *E. W. Buschman Co.* (6th Cir. 1967) 380 F.2d 255.)

There can be no question here that there is evidence that Allstate was at least *attempting to "chill"* the employee's right under section 7, *if not in fact interfere with that right* (emphasis added). The jurisdictional question, however, must be resolved by our evaluation of whether that part of Allstate's activity in this case was merely peripheral or was sufficient to make the case a "reasonably arguable" unfair labor practice case.

The pleadings did not alert the parties to the question of preemption. It appears that before trial the unionization issue surfaced, with the discovery by Allstate of a misfiled document regarding Cannata's termination that made reference to his unionization activities. However, during the trial the question of unionization activities received only minimal attention, as previously noted. The vast bulk of evidence in this case addressed itself to Allstate's claims policies, personnel policies, agreements with Cannata, and damages. We have no difficulty in holding that upon the evidence Cannata's unionization activities were merely peripheral to the case, and as such an insufficient basis for depriving the state court of jurisdiction. (Cf. *International Assn. of Machinists* v. *Gonzales* (1958) 356 U.S. 617; *Sears Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters* (1976) 17 Cal.3d 893, 901.) We cannot say from the total evidence that Cannata's discharge was arguably an unfair labor practice within the meaning of the Act, thereby depriving the state court of jurisdiction.

Cannata's assertion that he does not come within the protection of sections 7 and 8 of the Act because he was a supervisory employee, is without merit. Below, he urged that he was a non-management employee. The testimony of his superiors was that he was considered a non-management employee. Moreover, it has been held that state courts lack jurisdiction of a dispute despite the proposition that the plaintiff is a supervisor asserting exemption from the scope of the Board's jurisdiction if the presence of NLRB jurisdiction is arguable. (*Writers' Guild of America West, Inc.* v. *Superior Court* (1975) 53 Cal.App.3d 468, 474.) Respondent argues that the terms "managerial" and "non-managerial" as used in the special verdicts were ambiguous, that the word "supervisor" should have been used. However, the jury instruction defining the term "managerial employee" was in effect the definition of "supervisor" contained in the Act.

2. Appellant contends that the causes of action alleged in the complaint are barred by the statute of frauds. Prior to the court's instructing the jury, appellant withdrew its instructions on the statute of frauds defense. Respondent accordingly withdrew his proposed instructions relating to circumstances taking a case out of the statute of frauds, i.e., part performance and estoppel. Thus the issue of the statute of frauds and the related concepts of part performance and estoppel were never before the jury. Having withdrawn the defense at trial, appellant is precluded from raising it on appeal. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 266-273, 276, pp. 4257-4262, 4264-4265.)

3. Appellant next contends that the admission of Cannata's testimony regarding Allstate's practices and policies in dealing with claims was prejudicial. The evidence was clearly relevant. (Evid. Code, §§ 350-351, 210; Witkin, Cal.

Evidence (2d ed. 1966) §§ 302-303, pp. 266-267.) The testimony complained of regarded alleged unlawful and unethical policies of Allstate which were the factual basis of the employment misrepresentation. We conclude that the trial court did not abuse its discretion in admitting such evidence. (Evid. Code, § 352.)

4. Appellant next contends that the court erred in denying its motions for nonsuit and a directed verdict as to the cause of action alleging malicious and fraudulent misrepresentation by Allstate that Cannata would fully participate in a profit-sharing pension fund when, in fact, it was company policy to terminate large numbers of employees who had just commenced participation or were shortly to participate in the program. Appellant urges that there was no evidence to support the cause of action. We indulge in every legitimate inference from the evidence in favor of respondent and disregard the contradicting evidence. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 353, pp. 3152-3153.) There was evidence that Allstate made efforts to terminate personnel over 50 years of age just as they commenced participation in the plan, and examples of involuntary termination of employees who were about to become eligible. This is substantial evidence to support the allegation.

5. Appellant further contends that the court's instructions as to fraud were erroneous. The instruction given is based upon Civil Code section 1572 and is substantially similar to that proposed by appellant. Instructions in the language of an applicable statute are properly given. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 201, p. 3019.) Furthermore, the jury was specifically instructed to determine "whether any statement that plaintiff would not be required to do anything which violated his conscience was

a statement of fact by Allstate or whether it was merely a statement of its opinion as to future occurrences at the time that it was made. If the statements were statements of opinion only and not of material fact, they cannot be a basis of liability for fraud." This is a proper instruction. (*Crandall* v. *Parks* (1908) 152 Cal. 772.)

6. Appellant contends that there is no substantial evidence that Allstate personnel had authority to grant Cannata "non-terminable" employment. The evidence offered, however, and apparently accepted by the jury, was that Cannata was offered employment until retirement at age 62 or 63, on condition that he follow the lawful directions of his superiors and that he would be given notice so that he might improve his performance if his job became in jeopardy. Judson Branch, the President of Allstate, testified that whatever "commitments Allstate would make to a new employee, the person who hired him and interviewed him in the claims department would have the authority to make those commitments." Keller Potter, Allstate regional manager, testified to substantially the same effect. There was clear actual authority to make the employment representations alleged to have been made. The jury obviously accepted Cannata's account of the facts, and its determination must be upheld on appeal. (*Crawford* v. *Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

7. Appellant next contends that the damages awarded are excessive as a matter of law. It is argued that the award of compensatory damages is unsupported by the evidence and was based upon speculation and conjecture. Similar arguments were set forth by appellant in support of its motion for new trial, which was denied by the lower court. The primary duty to scrutinize the jury's verdict rests on the trial court, which is necessarily more familiar

with the evidence than the appellate court. Thus, while the trial court's determination is not binding upon a reviewing court, the granting or denying of a new trial on the basis of excessive damages is generally upheld. (*Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64.)

Dr. Robert Miller, an economist called as an expert witness by respondent, testified to Cannata's compromised future earnings as a result of his termination. Dr. Miller gave his opinion of the amounts respondent could have expected to accumulate, in wages and pension, had he stayed with Allstate and attained the position of regional claims manager (the position both parties concede Cannata would have had to attain to support the jury's compensation damage determination). Dr. Miller then computed the amounts respondent would probably earn in his current job with the Environmental Protection Agency.

There was ample evidence from which the jury could infer that respondent would have been promoted had he not been terminated. A performance evaluation by McGeachy in 1962 that Cannata "has the ability to advance far in claims work"; a personnel record note in 1962 that Cannata "shows potential for advancement"; a performance evaluation in 1966 that Cannata "has the ability to join the management group"; Regional Manager Potter's letter in 1966 that "Cannata will be ready for DSO Manager by July, 1967"; an employee salary review report in 1967 that Cannata is "deserving of this merit increase because of his continued high performance" and that he has "the potential for advancement to a higher position," are ample evidence to support an implied finding of promotability and negate the allegation that the verdict was based on conjecture. The reviewing court must uphold an award of damages whenever possible, and all presumptions are in

favor of the judgment. (*Bertero* v. *National General Corp., supra,* 13 Cal.3d at p. 61.)

8. As its final assignment of error, appellant contends that there was insufficient evidence of fraud to support an award of punitive damages, and that the jury's verdict was "motivated by antipathy for Allstate and its claims practices."

It is well settled that there is no fixed standard by which punitive damages can be determined, and both the award and the amount thereof are left to the discretion of the jury, upon a consideration of all the circumstances, subject to the general rule that the award will be rejected if it is without support in the evidence. (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 867, p. 3155.) Viewing the facts in a light most favorable to the judgment, it appears from the record that there was sufficient evidence upon which to base a finding of fraud. (*Bertero* v. *National General Corp., supra,* 13 Cal.3d at p. 65.) The amount of the award, though substantial, is not disproportionate to the compensatory damage award.

Judgment is affirmed.

.....
Scott, J.

We concur:

.....
Draper, P. J.

.....
Brown (H. C.), J.

Appendix B

Court of Appeal of the State of California
In and for the
First Appellate District

DIVISION THREE

No. 37878
(Sup. Ct. No. 603623)

Joseph A. Cannata,
Plaintiff,

vs.

Allstate Insurance Company,
Defendant.

BY THE COURT:

The petition for rehearing is hereby denied.

Dated Nov. 19, 1976

DRAPER, P. J.

Appendix C

ORDER DENYING HEARING

After Judgment By the Court of Appeal
1st District, Division 3, Civil No. 37878

In the Supreme Court of the State of California
IN BANK

Cannata

v.

Allstate Insurance Company

Supreme Court Filed
Dec. 29, 1976
G. E. BISHEL, Clerk

Appellant's petition for hearing DENIED.

McComb, J., Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

WRIGHT
Chief Justice